No. 77-217

In the Supreme Court of the United States

OCTOBER TERM, 1977

ROBERT P. BAGERIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The order of the court of appeals (Pet. App. 2a-3a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1977. A petition for rehearing was denied on July 1, 1977. The petition for a writ of certiorari was filed on August 4, 1977, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner, by failing to move to suppress before trial, waived his objection to the use in evidence of a statement he made to arresting offices during routine booking procedures.

2. Whether petitioner is entitled to a new trial because a government witness stated that petitioner had refused to sign a waiver of rights form, where the jury was immediately admonished to disregard that statement.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of possession of marihuana (five counts), amphetamines (two counts), and cocaine (two counts), all with intent to distribute, and on one count of simple possession of marihuana, in violation of 21 U.S.C. 841(a)(1) and 844.[1] He was sentenced to one year's imprisonment and three years' special parole on each of the five marihuana counts, to three months' imprisonment on the simple possession of marihuana count, to three years' imprisonment and three years' special parole on each of the remaining counts, and to fines totalling $8,550 (Pet. App. 1a-2a). The sentences of imprisonment were to be served concurrently (*ibid.*). The court of appeals affirmed (Pet. App. 2a-3a).

On September 19, 1974, agents of the Drug Enforcement Administration executed a search warrant for the premises occupied by petitioner. During the search they seized marihuana, amphetamines and cocaine and arrested petitioner.

[1]An earlier trial of petitioner had resulted in a mistrial (Pet. 5).

At trial the government attorney asked one of the DEA agents who had participated in the booking procedures following petitioner's arrest if petitioner had been asked during those proceedings whether he used narcotics (A. 44a-45a).[2] Defense counsel then requested that the matter be taken up outside the presence of the jury (A. 45a). The jury was excused, and defense counsel objected to the admission of any testimony regarding statements made by petitioner during the booking process (A. 48a). The district court observed that the issue had not been raised in petitioner's pretrial motions to suppress, that petitioner's first trial had ended in a mistrial because of "the personal history problems," and that counsel could not claim surprise with regard to the testimony the government sought to introduce (A. 47a). The court then heard argument from counsel and ruled that the testimony was admissible, noting that the agent conducting the booking proceedings had warned petitioner of his *Miranda* rights and that, under the circumstances, it would not entertain a midtrial motion to suppress (A. 50a). The court did, however, allow defense counsel to conduct a *voir dire* examination of the government's witnesses (*ibid.*).

During the *voir dire*, a DEA agent testified that petitioner was given *Miranda* warnings when he was arrested (A. 46a, 53a). He was then taken to the DEA office, where he was again advised of his rights and given a waiver of rights form. Petitioner declined to sign the form and stated that he did not wish to make a statement (*ibid.*). Petitioner was then photographed, fingerprinted, and asked routine questions read to him from a personal

[2]"A." refers to petitioner's appendix on appeal, a copy of which we have lodged with the Clerk of this Court.

history form (A. 44a-45a). The questions on the form related to the arrestee's name, address, identifying data, residence, and educational background, the names and addresses of family members, the arrestee's use, if any, of narcotics, and his or her "characteristic marks or conditions" (A. 45a). In response to the questions about narcotics, petitioner stated that he used no drugs, "[n]ot even marijuana" (A. 67a). When the jury returned, that statement was admitted into evidence as proof of petitioner's intent to distribute the 863.11 grams of marijuana discovered during the search of his house.[3]

ARGUMENT

1. Petitioner contends (Pet. 7-14) that the statements made by him following his arrest were obtained in violation of the principles of *Miranda* v. *Arizona*, 384 U.S. 436, and therefore should have been suppressed. Petitioner did not, however, raise this claim in a timely fashion in the district court, and he is therefore not entitled to have it considered now.

Although petitioner was aware prior to trial of any facts that might have tended to support his allegations (see A. 48a), he did not complain of improper custodial interrogation in the suppression motions that he filed, each of which sought suppression of the evidence seized during the search of his home.[4] Accordingly, no evidence presented at the suppression hearings (A. 1a-44a) touched

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[3]See Counts 1-4, 7, and 11 of the indictment (A. 195a-197a); 863.11 grams equals nearly two pounds.

[4]Petitioner's motions to suppress complained of the alleged insufficiency of the affidavit in support of the search warrant (A. 201a-205a), alleged defects on the face of the affidavit and in the warrant, and the conduct of the agents during the execution of the warrant (A. 230-238). He does not present those claims here.

upon the circumstances surrounding the booking procedures. Under the pertinent Rules of Criminal Procedure in effect at the time of petitioner's trial, a motion to suppress prosecution evidence must be made prior to trial.[5] Petitioner neither made such a motion nor demonstrated good cause for failing to do so, and accordingly he must be deemed to have waived his challenge.[6]

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[5]The provisions in effect at petitioner's trial were former Rules 41(f) and 12, Fed. R. Crim. P. While the language of those provisions was not as explicit as the current Rules, they had consistently been held to state essentially the same requirement. See, *e.g.*, *United States* v. *Mauro*, 507 F. 2d 802, 807 (C.A. 2), certiorari denied, 420 U.S. 991; *United States* v. *Farnkoff*, 535 F. 2d 661 (C.A. 1); *United States* v. *Sisca*, 503 F. 2d 1337, 1349 (C.A. 2), certiorari denied, 419 U.S. 1008; *United States* v. *Ceraso*, 467 F. 2d 653, 659 (C.A. 3); *United States* v. *Peterson*, 524 F. 2d 167, 170 (C.A. 4), certiorari denied, 423 U.S. 1088. Cf. *United States* v. *Barber*, 495 F. 2d 327 (C.A. 9). See generally *Segurola* v. *United States*, 275 U.S. 106, 112. Although under the old rules the district court would have had discretion to excuse petitioner from the consequences of his waiver, that was not done in this case. This discretion no longer exists. See Fed. R. Crim. P. 12(b)(3) and 12(f).

[6]Petitioner correctly notes that the decision of the District of Columbia Circuit in *Procter* v. *United States*, 404 F. 2d 819, is at odds with the decisions of other courts of appeals regarding the propriety of the government's asking routine booking questions of a defendant who, after having received *Miranda* warnings, has refused to discuss the crime for which he has been arrested. See, in addition to the decision below, *United States* v. *Prewitt*, 553 F. 2d 1082 (C.A. 7), certiorari denied, October 3, 1977 (No. 76-6665); *United States* v. *Grant*, 549 F. 2d 942, 946 (C.A. 4), certiorari denied, June 20, 1977 (No. 76-6463); *United States ex rel. Hines* v. *LaVallee*, 521 F. 2d 1109, 1112-1113 (C.A. 2), certiorari denied *sub nom. Hines* v. *Bombard*, 423 U.S. 1090; *Morrison* v. *United States*, 491 F. 2d 344, 345 (C.A. 8); *United States* v. *La Monica*, 472 F. 2d 580 (C.A. 9); *Farley* v. *United States*, 381 F. 2d 357, 359 (C.A. 5), certiorari denied, 389 U.S. 942; see also *United States* v. *Martinez*, 512 F. 2d 830, 833 (C.A. 5); *Smith* v. *United States*, 505 F. 2d 824 (C.A. 6). Cf. *United States* v. *Menichino*, 497 F. 2d 935, 940-941 (C.A. 5). Our view is that, especially in cases such as this one, where the arrestee was given

2. During the direct examination of one of the DEA agents involved in the arrest and processing of petitioner, the following colloquy occurred (A. 68a):

> A. After the search was completed, we took [petitioner] down to our office in the Federal Building, fingerprinted, photographed him and took a personal history sheet.
>
> Q. By we, who do you mean, sir—
>
> * * * * *
>
> A. Myself, Agent Turner and Agent Stepp were involved in the processing of [petitioner].
>
> Q. (By Mr. Sharp, continuing): And what, exactly, was your assignment in the processing of [petitioner]?
>
> A. When we first arrived in the office, took [petitioner] to our processing area and our lock-up. I advised [petitioner], again, of his Constitutional rights.
>
> [Petitioner] was then given a waiver of rights sheet which he read over and he refused to sign it.
>
> MR. BARRIS [defense counsel]: Your Honor, I think—may we have the jury excused, please.

After the court had excused the jury, defense counsel moved for a mistrial on the ground that the agent's testimony amounted to an impermissible comment on petitioner's exercise of his Fifth Amendment privilege

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full *Miranda* warnings at the time of arrest and again at the DEA office, law enforcement officials may properly ask routine booking questions that have legitimate, noninvestigative purposes relating to the proper custody and management of the arrestee. Cf. *South Dakota* v. *Opperman*, 428 U.S. 364; *Cady* v. *Dombrowski*, 413 U.S. 433.

against compulsory self-incrimination. The government attorney conceded that "the comment was unfortunate" (A. 69a) but argued that it was dissimilar to the testimony that had caused petitioner's first trial to end in a mistrial (then a government witness testified that petitioner had indeed exercised his privilege and had refused to make any statement (*ibid.*)). Defense counsel agreed that the situations were dissimilar (*ibid.*), but he argued that the agent's testimony about petitioner's refusal to sign the waiver form was irrelevant and possibly prejudicial to petitioner (*id.* at 69a-70a). The district court then stated that the government attorney's question of the witness had not been designed to elicit the testimony to which defense counsel objected (*id.* at 70a-71a):

> THE COURT: The question did not include that; the answer went beyond the question. I don't see anything improper with the question. I think the question was essentially, particularly in the defendant's view, as to what would be done and I think the matter could be covered by instructing the jury that there is no obligation by anyone to sign that form and I intend to so instruct them.
>
> MR. SHARP: Thank you, your Honor.
>
> MR. BARRIS: Thank you.
>
> THE COURT: Will you be very cautious, Mr. Antonucci [the DEA agent], to answer Mr. Sharp's questions and not include any more than he asks you. These are areas that are very difficult. If he has to ask you a leading question, I would permit him to do so. I would prefer to have a leading question- - - and you may not recognize, as a witness, from what happened before, you're not a lawyer, but will you be cautious in that respect?

MR. BARRIS: I assume your Honor is denying the motion?

THE COURT: I'm denying the motion. I'm going to tell the jury there is no obligation for anyone to sign the form without indicating what the form is.

MR. BARRIS: Thank you, your Honor.

The jury was then recalled and the district court instructed it that "there is absolutely no obligation or requirement that any person sign the form which the witness just referred to. There's no obligation on him or requirement, at all, that he sign any such form" (*id.* at 71a).

Contrary to petitioner's argument (Pet. 14-16), the agent's brief remark (A. 68a) that petitioner was "given a waiver of rights sheet which he read over and he refused to sign it" did not deprive petitioner of a fair trial. While petitioner is correct in stating that *Doyle* v. *Ohio*, 426 U.S. 610, and *United States* v. *Hale*, 422 U.S. 171, forbid the government from discrediting the defendant's trial testimony with evidence of his silence at the time of arrest (and after having received *Miranda* warnings), we submit that those cases are inapposite here, where the testimony to which petitioner objects was not deliberately elicted by the government attorney and was not used to establish any material element of the prosecution's case or to impeach his own testimony (petitioner did not testify at trial). Nor does *Griffin* v. *California*, 380 U.S. 609, forbidding comment on the defendant's exercise of his Fifth Amendment privilege, require reversal here. The agent's testimony about petitioner's refusal to sign the waiver form amounted to no more than one isolated, inadvertent remark that, when taken in the context of the entire trial—which included evidence of petitioner's possession of the marihuana, cocaine, and amphetamines

found in his house, as well as the district court's immediate curative instruction—was harmless beyond a reasonable doubt. See *Milton* v. *Wainwright*, 407 U.S. 371.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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